Supreme Court, U.S.
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No. 91-1279

In The

Supreme Court of the United States

October Term, 1991

PAULINE KULZER, Individually and as Executrix of the Estate of Richard Kulzer, Deceased,

Petitioner,

-against-

OWENS-CORNING FIBERGLAS CORP.,

Respondent,

MANVILLE CORPORATION ASBESTOS DISABILITY COMP. FUND,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT OWENS-CORNING FIBERGLAS CORPORATION

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider the Petition for Certiorari where Petitioner filed the Petition for Certiorari more than ninety days after the denial of the petition for rehearing by the Court of Appeals?

2. Is the time for filing a petition for certiorari tolled by a motion filed after the denial of a petition for rehearing, seeking the same relief, and made without seeking an extension of time in which to file a petition for certiorari?

3. Where Petitioner claims that the Court of Appeals failed to address issues necessary to its decision dismissing her complaint, but where those issues were before the Court on the appeal and twice more brought to the Court's attention on post-appellate motions, and the Court denied those motions, does Petitioner state any grounds for relief in this Court?

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JURISDICTIONAL STATEMENT

This Court is without jurisdiction to consider the Petition for Certiorari. Petitioner's petition for rehearing was denied by the United States Court of Appeals for the Second Circuit on October 7, 1991. Petitioner filed her Petition for Certiorari by mail postmarked January 7, 1992, more than ninety days after the denial of her petition for rehearing. Petitioner neither obtained nor even sought an extension of time within which to file a petition for a writ of certiorari. Pursuant to Title 28, United States Code, Section 2101(c) and Rule 13 of the Rules of the Supreme Court of the United States, Petitioner's Petition for Certiorari is jurisdictionally out of time.

STATEMENT OF THE CASE

This asbestos personal injury action was first tried before a jury in the United States District Court for the Western District of New York in April, 1990 ("Kulzer I"). After two weeks of trial, the jury returned a verdict in favor of defendant-respondent Owens-Corning Fiberglas Corporation ("OCF") and two co-defendants.[1] The trial court thereafter set aside the verdict and ordered a new trial. In November, 1990, after a second two-week trial ("Kulzer II"), the jury returned a verdict for plaintiff-petitioner Pauline Kulzer ("Petitioner" or "Kulzer").

[1] In accordance with Rule 29 of the Rules of the Supreme Court of the United States, OCF states that OCF has no corporate parent and that, excluding wholly-owned subsidiaries, OCF has one non-wholly-owned subsidiary, Veroc Technology A/S.

OCF appealed to the United States Court of Appeals for the Second Circuit ("Second Circuit") on numerous grounds including: (1) the district court twice improperly denied OCF's motions to dismiss Kulzer's wrongful death claim as barred by the Statute of Limitations; (2) the district court improperly granted Kulzer's motion for a second trial, substituting its judgment for that of the jury; and (3) OCF was denied a fair second trial as the result of numerous errors committed by the district court.[2]

The Second Circuit reversed the judgment against OCF and remanded to the district court with instructions to dismiss the complaint.

Kulzer thereafter petitioned the Second Circuit for rehearing with a suggestion that the action be reheard in banc arguing, *inter alia*, that the Second Circuit erred in dismissing the entire complaint instead of just the wrongful death claim. On October 7, 1991, the Second Circuit denied the petition for rehearing. On November 1, 1991, pursuant to the Second Circuit's mandate which issued on October 18, 1991, the district court vacated the judgment against OCF and dismissed Kulzer's complaint.

On November 12, 1991, when there was no longer any action pending between the parties and nearly one month after Petitioner's motion for rehearing had been

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[2] Those errors included improperly shifting the burden of proof to defendant OCF on a critical issue, instructing the jury to disregard the intervening negligence of Kulzer's decedent's employer, and permitting inflammatory argument by Kulzer's counsel.

denied, Petitioner filed a motion styled a "motion to amend the mandate," again arguing that only the wrongful death claim should have been dismissed. On December 16, 1991, the Second Circuit denied Kulzer's motion.

On January 7, 1992, more than ninety days after the denial of her petition for rehearing, Kulzer filed her Petition for Certiorari ("Petition" or "Petition for Certiorari"). By letter dated January 16, 1992, the Clerk of this Court notified Kulzer that her Petition for Certiorari, filed more than ninety days after the denial of her petition for rehearing, was jurisdictionally out of time and, therefore, would not be docketed.[3]

On January 27, 1992, Kulzer filed a Motion Directing the Clerk to Accept Petitioner's Petition for a Writ of Certiorari ("Motion"). Kulzer did not contest that the Petition was filed more than ninety days after denial of her petition for rehearing, but argued instead that the time should be computed from the denial of her subsequent motion to amend the mandate. On February 4, 1992, OCF filed an affidavit in opposition to the Motion.

On February 19, 1992, OCF learned that the Clerk's Office placed the Petition on this Court's docket on

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[3] The letter from the Office of the Clerk of this Court stated in pertinent part:

> The time for filing this petition appears to have expired on January 6, 1992, 90 days from October 7, 1991, the date rehearing was denied. The postmark, on the Express Mail package, indicates that the petition was mailed January 7, 1992, one day late, and therefore was untimely filed.

February 3, 1992, leaving the issue whether this Court has jurisdiction to consider the Petition to be resolved by this Court.

SUMMARY OF THE ARGUMENT

This Court is without jurisdiction to consider Petitioner's Petition for Certiorari. The Petition, filed more than ninety days after the denial of Petitioner's petition for rehearing by the Second Circuit, is jurisdictionally out of time, pursuant to Title 28, United States Code, Section 2101(c) and Rule 13 of the Rules of the Supreme Court of the United States. Petitioner neither obtained nor even sought an extension of time within which to file her Petition. Petitioner's motion before the Second Circuit to amend the mandate -- filed after the denial of her petition for rehearing and seeking the same relief which had been denied -- did not extend her time to file her Petition.

Even if the Petition had been timely filed, the Petition fails to raise any issue warranting review on writ of certiorari. Petitioner asks this Court to correct an alleged error in the Second Circuit's mandate which directed the district court to dismiss Kulzer's complaint. Petitioner contends that the mandate is in error because the appellate court's opinion addressed only one of three claims in the complaint. Petitioner, however, twice brought this alleged error to the attention of the appellate court by post-appellate motion and the Second Circuit twice denied the motion. Thus, contrary to Petitioner's contention that the Court of Appeals failed to consider issues

critical to its dismissal of her complaint, the Second Circuit twice affirmed its direction that the entire complaint be dismissed. That decision was amply supported by an extensive record spanning almost five years and replete with errors warranting the result reached.

Here, Petitioner's contention is not simply meritless. It also fails to raise any issue of constitutional dimension which would warrant the time and attention of this Court. It sets forth no "special and important reasons" for the grant of certiorari, as described in Rule 10 of the Rules of the Supreme Court of the United States.

Accordingly, Kulzer's Petition should be rejected as untimely filed or, alternatively, her Petition for Certiorari should be denied.

ARGUMENT

A. KULZER'S PETITION FOR CERTIORARI WAS UNTIMELY FILED

Kulzer's Petition for Certiorari was not filed within ninety days of the denial of her petition for rehearing. The failure to do so is jurisdictional.

Rule 13 of the Rules of the Supreme Court of the United States expressly provides:

> .1 A petition for a writ of certiorari . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment.
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> * * *

> .4 The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . . However, if a petition for rehearing is timely filed in the lower court . . . the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

As this Court has held, the time limitations of Rule 13 reflecting Congress's mandate as set forth in Title 28, United States Code, Section 2101(c), are jurisdictional:

> Title 28 U.S.C. § 2101(c) (1982 ed.) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits.

Missouri v. Jenkins, 495 U.S. 33, ___, 110 S.Ct. 1651, 1660, 109 L.Ed. 2d 31 (1990).

Rule 13 further provides instructions to the Clerk of the Court with respect to untimely petitions:

> .3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Petitioner contended in her Motion to this Court that her time to file a petition for certiorari was somehow tolled because she made a motion before the Second Circuit subsequent to the denial of her petition for rehearing seeking the same relief which had been denied. Petitioner, however, failed to offer any authority for this

proposition.[4] Nor is there any reason to permit a petitioner to thus extend the mandated time limit by the filing of a subsequent and duplicative motion. Indeed, Petitioner's argument is particularly unappealing when one considers that the rules of this Court provide a procedure for seeking an enlargement of time within which to file a petition for certiorari and Petitioner declined to avail herself of that procedure. *See* Rules 13 and 30 of the Rules of the Supreme Court of the United States. Thus, the circumstances here simply provide no justification for denying OCF the finality provided by the time limitations of Rule 13. After almost five years, two jury trials, an appeal, Petitioner's subsequent petition for rehearing with a suggestion for rehearing in banc, and her motion to amend the mandate, this litigation should finally conclude.

B. KULZER'S PETITION FOR CERTIORARI IS MERITLESS AND SETS FORTH NO REASONS WARRANTING REVIEW ON WRIT OF CERTIORARI

Kulzer's Petition for Certiorari is based on an alleged error in the mandate of the Second Circuit and does not concern, as Kulzer conceded in her Motion, "the propriety of the Second Circuit's legal opinion." Motion at 4. Kulzer argues, in essence, that the Second Circuit erred in

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[4] Indeed, the only cases cited by Petitioner in her Motion, *Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 341 (2d Cir. 1973) and *Riley v. MEBA Pension Trust*, 586 F.2d 968, 972 (2d Cir. 1978), have nothing whatever to do with the issue whether a motion to amend a mandate tolls the time for filing a petition for certiorari.

discussing only one claim and dismissing three claims. When this alleged error was twice brought to the Second Circuit's attention, however, through Petitioner's motion for rehearing with a suggestion for rehearing in banc and through a motion to amend the mandate, the Second Circuit denied those motions, thereby ratifying its decision.[5]

Kulzer's contention that the Second Circuit ordered the complaint dismissed "without any legal justification for such an action," Petition at 12, is false. In fact, the Second Circuit was presented with an extensive record spanning almost five years and replete with errors warranting the dismissal of Kulzer's action. OCF raised, briefed and argued before the Second Circuit issues challenging the entirety of Kulzer's judgment.[6] Thus, the

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[5] In denying Kulzer's petition for rehearing, the Second Circuit noted that the suggestion for rehearing in banc had been "transmitted to the judges of the court in regular active service and to any other judge that heard the appeal" and "no such judge has requested that a vote be taken." Appendix to the Petition ("App.") at 62.

[6] Petitioner's carefully crafted statements suggesting the contrary are misleading. Petitioner asserts in no less than two places in her Petition that "OCF did not raise any issue relating to the *timeliness* of petitioner's spousal derivative claim." Petition at 6 (emphasis added); *see also* Petition at 9-10. Petitioner also asserts that "the Second Circuit's mandate is unconstitutionally overbroad because it grants relief not requested by the respondent in the district court," and "not briefed by any of the parties on appeal." Petition at 7. Petitioner neglected to mention, however, that OCF challenged on appeal, among other things, the district court's grant of Kulzer's motion for a second trial (which deprived OCF of a jury verdict in its favor) and the district court's denial of OCF's motion for judgment n.o.v after the second trial. App. at 71-73.

Second Circuit's decision was amply supported by the record before it.

In short, Kulzer's Petition for Certiorari is based on some assumed entitlement to a written opinion by the Second Circuit justifying the dismissal of the entire complaint. The law, however, is to the contrary. *See Taylor v. McKeithen*, 407 U.S. 191, 92 S.Ct. 1980, 1982 n.4, 32 L.Ed. 648 (1972) ("the courts of appeals should have wide latitude in their decisions of whether or how to write opinions"); *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983) ("[t]here is no requirement in law that a federal appellate court's decision be accompanied by a written opinion"); *see also Jones v. United States*, No. 88 Civ. 3999, 1990 WESTLAW 6566, at *2-3 (S.D.N.Y. Jan. 24, 1990) (in reinstating conviction on one ground, the appellate court implicitly rejected the defendant's separate challenge to that count on grounds of insufficiency of the evidence, although the court did not explicitly address the sufficiency argument), *aff'd*, 918 F.2d 9 (2d Cir. 1990).

Finally, Kulzer's contention that the Second Circuit's decision deprived her of her Seventh Amendment right to trial by jury is nothing more than a transparent pretext to mask a meritless claim, twice resolved by the appellate court and not warranting review by this Court. Indeed, on Kulzer's logic, any appellate error following a jury trial would raise Seventh Amendment issues. Clearly, Kulzer's Petition fails to raise any "special and important reasons" of the character of those set forth in Rule 10 of the Rules of the Supreme Court of the United States. Accordingly, Kulzer's Petition for Certiorari should be denied.

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CONCLUSION

For the foregoing reasons, this Court should find Kulzer's Petition for Certiorari to be jurisdictionally out of time. Alternatively, this Court should deny Kulzer's Petition for Certiorari as not warranting Supreme Court review.

Dated: March 4, 1992

Respectfully submitted,

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